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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1013

IN THE MATTER OF THE APPLICATION OF FRANCIS HUTCHINS, a/k/a "HUTCH," ULYSSES WALLS; NORMAN PRINCE and ERNEST HERNDON, a/k/a, "JABO," FOR A WRIT OF CERTIORARI.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TO: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered October 31, 1967, rehearing denied December 14, 1967.

STATEMENT OF THE MATTER INVOLVED

Petitioners heretofore applied to the United States District Court for the District of New Jersey for a writ of habeas corpus. They sought relief from a judgment entered in the Superior Court of New Jersey on November 2, 1962,

following a jury verdict, which judgment charged them with conspiracy to conduct a lottery, in violation of *N. J. S. A. 2A:98–1 & 2.* Their application was denied and appeal was taken to the United States Court of Appeals for the Third Circuit, which in turn affirmed the District Court. An application was then made for a rehearing before the court en banc, which application was denied.

Pursuant to the rules, the Clerk of the Circuit Court has been asked to file the appropriate record with this court. In this statement when we refer to the record below, we will take the paging as shown by the printed record in the appellate court. The facts which illuminate this controversy are succinctly set forth in Judge Augelli's opinion in the District Court found at pages 3a to 13a.

The case presents the question of a warrantless search. It arose in the following manner. All of the petitioners stood trial as conspirators. One of them, Norman Prince, resided in the City of Englewood, County of Bergen, New Jersey. On April 10, 1962, George B. Gelman and Anthony A. Andora, assistant county prosecutors, drove to the home of Prince. The trip was made in a private automobile. As they came to the vicinity of Prince's home, he was observed about to enter the premises. They called to him and he met them at the door of his home. There he was told that they had a search warrant. They then proceeded to search his home but found nothing of an incriminating nature. They then searched his person and found cash totaling $752.24, some personal business cards, and a wallet (7a). These items were admitted in evidence at the trial over objection that they had been seized pursuant to an improperly issued search warrant.

From the resulting judgment of conviction, an appeal was taken to the Appellate Division of the Superior Court of New Jersey, the intermediate appellate court. Appellants argued that the search warrant was improperly issued. The State maintained the contrary, and also asserted that the evidence was immaterial. While the cause was

awaiting decision, the court inquired of counsel for both Petitioners and the State whether an arrest warrant had been issued. This inquiry arose because of a suggestion at the trial that an arrest warrant had in fact been issued. Both counsel agreed that there was no such warrant. Actually the so-called search warrant was never found, nor the complaint upon which it was based. The proceedings were conducted on the authenticity of carbon copies. The appellate court reversed the conviction on the ground that the trial judge had improperly inquired of the jury the numerical vote when it reported it was hopelessly deadlocked. The court then went on to rule that the search warrant was improperly issued and that the evidence should not have been introduced at the trial.

The State then applied for and obtained certification from the Supreme Court of New Jersey. In its brief it adhered to its position below that the search warrant was properly issued, but in any event that the evidence seized was immaterial. At the oral argument, however, it advanced for the first time the suggestion that Prince was lawfully arrested, and therefore there was a proper search as an incident to a lawful arrest. The Supreme Court of New Jersey reversed the action of the Appellate Division for holding that the trial judge erred in interrogating the jury. It sustained the Appellate Division on its holding that the search warrant was improperly issued. It further held that the evidence seized was crucial. It remanded the cause to the trial court to determine whether there had been a lawful arrest and a search incident thereto. *State* v. *Hutchins, 43 N. J. 85 (1964).* The Supreme Court stated that it retained jurisdiction of the cause. On the remand testimony was taken and it is printed starting at page 23a. The trial court stated that there was a lawful arrest and a valid search incident thereto.

We must now state another issue that arose in the case. One of the defendants, Herndon, had not taken the stand at the trial at the State level. Both the prosecutor and the

trial court commented on this failure. That was a correct statement of the law as it was understood in 1962. *State* v. *Corby, 28 N. J. 106 (1958).* In the interim, however, this court decided *Malloy* v. *Hogan, 378 U. S. 1 (1964).* Counsel for petitioners then called to the attention of the Supreme Court of New Jersey the decision in *Malloy* and asserted that the trial court's charge vitiated the judgment. The State court filed a per curiam opinion on February 11, 1965 concurring in the trial court's conclusions as to the arrest, *44 N. J. (1965).* It then held that the action of the trial court in commenting on the failure of Herndon to take the stand was not before it because of the limited retention of jurisdiction.

Petitioners then applied to the District Court for a writ of habeas corpus, and while that application was pending, this court decided *Griffin* v. *California, 380 U. S. 609.* The District Court then filed its opinion of May 18, 1965, dismissing the petition, without prejudice, in order that the petitioners might seek post-conviction relief in the State Courts in the light of the holding in *Griffin.*

At the trial level, post-conviction relief was refused and an appeal was taken and argued before the State Supreme Court on January 10, 1966. On January 19, 1966 this court decided *Tehan* v. *Shott, 382 U. S. 406.* The holding there was that except for cases still pending on direct appeal or reivew, that the *Griffin* rule need not be given retrospective application.

Thereafter, petitioners filed a second application for habeas corpus and the question presented to the District Court was whether there was in fact a valid arrest, No. 1; and number 2, if there was such a valid arrest, was that in turn vitiated by the failure of the State authorities to immediately arraign Prince before the nearest available magistrate, in accordance with the appropriate rules of the state court.

The District Court judge held that the findings of the state court were supported by the record, and further held

that failure to immediately arraign Prince did not reach constitutional dimension.

His judgment was affirmed by the Court of Appeals for the Third Circuit.

JURISDICTION

The jurisdiction of this court is invoked under Title 28 United States Code, Section 1254, together with the Fourth Amendment to the United States Constitution as implemented by the Fourteenth Amendment.

QUESTIONS PRESENTED

1. Whether it was permissible to make a search of the person of the petitioner, Prince, without a warrant.

2. Whether the State of New Jersey, purporting to act under the protection of a search warrant improperly issued, can justify the invasion of the petitioner's (Prince) home and the search of his person on the theory that he was lawfully arrested on a charge of a misdemeanor and a search of his home and person could be justified on the theory of a lawful arrest.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

If *Mapp* v. *Ohio, 367 U. S. 643 (1961)* was intended to impress on the law enforcement agencies of the States the sacredness of the citizen's person and premises, the number of cases reaching this court since that decision indicates a failure of purpose. We think the fault lies with the law enforcing agencies. There is a paradox in hailing a citizen into court charged with violating the law of the land when the prosecuting officials themselves have violated that same law. Limiting the ci zen to a civil action for damages did not stop the evil. This court concluded that the only effective way to make the constitutional privilege meaningful

was to prevent the State from using evidence illegally obtained. Unfortunately the law enforcing agencies, while giving lip service to *Mapp,* have been astute to find ways of evading it. The cases reaching this court, even under the limitations fixed on the issuance of the writ of certiorari, prove this fact.

The case now under review demonstrates the ease with which the constitutional protection is made nugatory. A search warrant is obtained and under its ambit a search is made of Prince's home and person. A motion is made in the State tribunal to suppress the evidence so obtained. This effort is resisted by the State on the theory that the search and seizure were justified by the warrant previously issued, and that there was probable cause for the issuance of that warrant. The trial court adheres to that view. Upon appeal the State again justifies its actions as being authorized by a validly issued search warrant. The intermediate appellate court rejects that contention. On appeal to the court of last resort, the State, for the first time, claimed a lawful arrest, without a warrant, and a search of person and premises pursuant thereto. It nevertheless maintained its position that the search warrant was properly issued and afforded ample protection. The State Supreme Court remands to determine whether there was a lawful arrest and a search incident thereto. The Assistant Prosecutor who handled the case against these petitioners at the trial level then testified that he had arrested Prince, based on a statement given to him some days before by an alleged accomplice. The trial court accepted this statement and it immediately raises the question here whether the constitutional immunities are to be emasculated by weighing the testimony of the law enforcing officers against that of the citizen whose rights have been invaded. If the balance is to be struck in favor of the State, the long and painful road which was traveled to *Mapp* was run in vain.

In *Camara* v. *Municipal Court, 387 U. S. 523, 528-29 (1967)* this court said that except in certain carefully de-

fined classes of cases a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant. It has long been settled, by this court, that a warrantless search of a private dwelling, no matter how "reasonable" it would have been if a warrant had been obtained, is nevertheless impermissible unless it falls within one of the specially defined exceptions from the warrant requirement. *Agnello* v. *U. S., 269 U. S. 20 (25).*

An officer is justified in making a search incident to a lawful arrest when there is need to seize weapons which the suspect might use to assault the officer or effect an escape, or to prevent him from destroying evidence. *Preston* v. *U. S., 376 U. S. 364, 367 (1964); U. S.* v. *Rabinowitz, 339 U. S. 56, 72 (1950).*

It must be observed that these exceptions are based on necessity. For instance, in *Camara* this court declared that the various justifications for warrantless searches depend "in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *387 U. S., at 533.*

The very purpose in requiring a search warrant is to permit a judicial screening of the facts upon which the officers rely. Such men are not permitted to be both prosecutor and judge. The judiciary stands between the law enforcing agency and the citizen, and requires that an appropriate balance be struck between the need of enforcing the law and securing the citizen his constitutional immunities. Mr. Justice Brennan in his dissent in *Abel* v. *U. S., 362 U. S. 217, 249-53 (1960)* implied that it might not be unreasonable to dispense with prior judicial scrutiny in cases of searches incident to arrest, since there would always be immediate subsequent judicial review in the form of an arraignment proceeding. This court did not adopt his views, but it is pertinent to note that here there was not an arraignment in accordance with the State procedure. This theory was argued by the petitioners in the court below both on the

original hearing and on the application for reargument before the court en banc. The point was also argued in the District Court (11a). The District Court judge found an arrest on April 10, 1962 and a waiver in writing by Prince the following day of any arraignment and preliminary hearing. The District Court judge said that this did not spell out a violation of any of his federally protected rights. The Court of Appeals concurred in that view.

In view of the concern which this court has manifested that prospective defendants be afforded the right of counsel at every meaningful step in the criminal process, we question whether the courts below appreciated the sweep of their holdings. In *U. S.* v. *Wade, 388 U. S. 218 (1967)* this court ruled that court room identifications could not be received in evidence if they were based upon observations made at a lineup where the defendant was not represented by counsel. In *Gilbert* v. *California, 388 U. S. 263 (1967)* the court similarly held inadmissible testimony concerning any identification made at such a lineup.

It is an elementary rule of law that if an officer purports to act on the authority granted him by law, and then steps outside of the protection of that law, he becomes a trespasser *ab initio*. If that be so, while not in the least agreeing that the initial "arrest" was lawful, the failure to promptly arraign Prince in accordance with the State procedure rendered the arrest unlawful.

This court has, in the interest of necessity, relaxed the rule requiring a warrant with respect to automobiles. *Cooper* v. *California, 386 U. S. 58 (1967)*. Due to the mobility of the vehicle to be searched, we can surely understand why the law enforcing officers might be given some leeway. Nevertheless, we feel that in accordance with the holdings in *Trupiano* v. *U. S., 334 U. S. 699 (1948)* and *McDonald* v. *U. S., 335 U. S. 451 (1948)*, a warrant should be obtained whenever it is reasonable to do so. Note, Search and Seizure in the Supreme Court: *Shadows on the Fourth Amendment, 28 U. Chi. L. Rev. 664, 688 (1961)*.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writ or certiorari should be granted.

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